No. 91-712

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC AND THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether lower executive officials may reinterpret a bilateral extradition treaty to add a new term authorizing forcible, unconsented governmental kidnapping, without legislative approval and over the treaty partner's repeated protests.

2. Whether this Court should sanction an executive reinterpretation of an extradition treaty that nullifies the treaty by violating the very norms of international law that gave it rise.

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IN THE
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October Term, 1991

No. 91-712

UNITED STATES OF AMERICA,
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v.
HUMBERTO ALVAREZ-MACHAIN
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC AND THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The Allard K. Lowenstein International Human Rights Clinic of the Yale Law School and the Center for Constitutional Rights

hereby submit the attached brief Amicus Curiae supporting affirmance of the Ninth Circuit's decision in this case.*

The Allard K. Lowenstein International Human Rights Clinic of the Yale Law School [Human Rights Clinic] was organized in 1991 at the Yale Law School as a faculty-supervised course under the auspices of the Allard K. Lowenstein International Human Rights Project, a ten-year old student-run organization that seeks to educate and inspire law students, scholars, practicing attorneys, and policymakers in the defense of international human rights.

The Human Rights Clinic has important interests in this case because it is currently acting as co-counsel for the plaintiffs in several ongoing lawsuits involving the interpretation of important international human rights treaties. See, e.g., Evans Paul, et al. v. Prosper Avril, No. 91-0399 (S.D. Fla. filed Feb. 28, 1991) (suit seeking damages for torture, arbitrary detention, cruel, inhuman or degrading treatment against former dictator of Haiti); Teresa Xuncax,

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*Amici Curiae file this brief with the consent of both parties in support of the position advanced by respondent. Letters of consent have been filed with the Clerk of this Court.

et al. v. Hector Gramajo, No. 91-11564WD (D. Mass filed June 6, 1991) (suit seeking damages for summary execution, disappearance, torture, arbitrary detention, and cruel, inhuman or degrading treatment against former defense minister of Guatemala). The important questions of treaty reinterpretation presented in this case may bear upon the issues in those lawsuits. The Court's disposition in this case is therefore of great interest to the Human Rights Clinic and its clients.

The Center for Constitutional Rights [CCR or Center] is a tax-exempt litigation organization devoted to enforcing the U.S. Bill of Rights and the International Bill of Rights. The Center has a particular interest in enforcing the norms of international human rights in United States courts. CCR was the lead counsel in the landmark case, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), which established that the Alien Tort Claims Act, 28 U.S.C. §1350 (1988), grants federal courts jurisdiction to hear cases seeking compensation for acts of torture that occured outside the United States. Since the Filartiga decision, the Center has been co-counsel

in numerous cases brought pursuant to the Alien Tort Claims Act involving interpretation of international human rights treaties, including the cases currently being brought by amicus Human Rights Clinic. The Court's decision in this case is thus of great importance to the Center and its clients.

SUMMARY OF ARGUMENT

In a brief not joined by the State Department Legal Adviser's office, the Justice Department accuses the Ninth Circuit of unlawfully reinterpreting the bilateral U.S.-Mexico extradition treaty, thereby "rewrit[ing] the international agreements to which this Nation is party." Justice Department Brief ("JD Br.") at 24. In fact, it is the Justice Department that has engaged in unlawful treaty reinterpretation, abruptly reading into a well-understood extradition treaty a new term authorizing forcible, unconsented governmental kidnapping.

The United States and Mexico entered their bilateral extradition treaty in 1980 to promote mutual cooperation in law enforcement. By entering into the treaty, the parties sought to

avoid future disputes, to protect territorial sovereignty, and to safeguard individual rights by creating an exclusive means for surrendering a suspect from one country to the other in all cases not involving consensual rendition. To that end, Article 9 of the treaty created only two options when one state formally seeks surrender of a national of the other: extradition or domestic prosecution.

In this case, low-level Drug Enforcement Administration (DEA) agents pursued an illegal third option: they forcibly kidnapped respondent Dr. Alvarez from Mexican territory without Mexican governmental consent, in bald violation of the treaty. When Mexico repeatedly demanded respondent's return, Justice Department lawyers sought to justify the DEA's action after the fact by reinterpreting Article 9, reading it to include a new term that would permit forcible, unconsented governmental abductions. Having twice failed below to win judicial endorsement of their novel rewriting, the Department's lawyers now ask this Court to

revise the treaty to permit the very kidnapping option that both parties negotiated the treaty to preclude.

The Department's reinterpretation does violence to the structure, plain language, negotiating and ratification histories, and object and purpose of the treaty. Notwithstanding the Constitution's treatymaking procedures and principle of separation of powers, the Department seeks to effect its reinterpretation--a de facto treaty amendment--without presenting that amendment to the Senate for either consultation or consent. Furthermore, the Department seeks to amend the treaty over repeated and vociferous objections by our treaty partner. Should this Court bless petitioner's revision of this treaty, potentially all of the extradition treaties to which the United States is currently party could be similarly reconstrued to permit forcible governmental abductions in the treaty partner's territory despite its explicit protest. Any of our treaty partners could invoke such a reinterpretation to justify forcible abduction of U.S. nationals from U.S. soil, even over our government's repeated and vehement objections.

This Court should not sanction an executive reinterpretation of an extradition treaty that would violate the very norms of international law that form its object and purpose. At least since United States v. Rauscher, 119 U.S. 407, 429 (1886), this Court has recognized that extradition treaties must be construed not in isolation, but in light of the norms of customary and conventional international law that gave rise to the treaty. Forcible, unconsented, state-sponsored abductions violate settled rules of both customary and conventional international law and disrupt intergovernmental cooperation. The United States and Mexico negotiated this treaty not simply to expedite prosecutions, but to promote mutual cooperation, to protect each state's territorial sovereignty from forcible intrusions, and to protect individual suspects from arbitrary arrests and detentions. Not content to read "shall" as "may," or to rewrite Article 9, the Justice Department now urges a treaty construction that so violates the parties' intent as to effectively nullify the treaty altogether. By standing the treaty on

its head, petitioner has provoked precisely the kind of international dispute that the extradition treaty was designed to prevent.

No serious dispute exists regarding respondent's "standing" to raise the treaty violation. The Supremacy Clause, the treaty, and applicable rules of international law all bar the executive from trying Mexican nationals who have been abducted to the United States in violation of the treaty, in cases where Mexico has unambiguously demanded their return. No United States court has ever tried a kidnapped foreign national under circumstances such as these. Nor has this Court ever authorized lower executive officials to nullify a duly ratified treaty without the advice and consent of the Senate, over the repeated protests of our treaty partner, and in flagrant violation of established norms of international law that formed the treaty's object and purpose. This Court should reject petitioner's invitation to condone such lawless conduct.[1]

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[1]Given the extreme set of facts presented here, this Court may affirm the Ninth Circuit's judgment without deciding whether the President himself could reinterpret a ratified treaty without the advice and consent of the Senate, or whether the President could reinterpret the extradition treaty with Mexican approval or acquiescence, in a manner fully consistent with the treaty's broad object and purpose and norms of international law.

ARGUMENT

I. LOWER EXECUTIVE OFFICIALS MAY NOT REINTERPRET A MANDATORY BILATERAL EXTRADITION TREATY TO ADD A NEW TERM PERMITTING FORCIBLE, UNCONSENTED GOVERNMENTAL KIDNAPPING.

Mexico and the United States have cooperated in law enforcement since 1862, concluding three extradition treaties and several mutual assistance agreements in criminal matters.[2] Against this long history of mutual cooperation, the U.S. and Mexico negotiated the current treaty, which entered into force on January

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[2]Extradition treaties between the U.S. and Mexico have been in force since 1862. See Treaty of Extradition, May 4, 1978, United States of America-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656 (entered into force January 25, 1980); Treaty for the Extradition of Criminals, the United States of America-United Mexican States, 12 Stat. 1199, Treaty Series No. 209 (entered into force May 20, 1862; terminated January 24, 1899); Treaty of Extradition, United States of America-United States of Mexico, 31 Stat. 1818, Treaty Series No. 242 (entered into force April 22, 1899; terminated 1980); Supplementary Convention, Treaty Series No. 421 (entered into force April 13, 1903); Supplementary Convention, 44 Stat. 2409, Treaty Series No. 741 (entered into force July 11, 1926); Supplementary Extradition Convention United States of America-United Mexican States, 55 Stat. 1133, Treaty Series No. 967 (entered into force April 14, 1941).

The U.S. and Mexico have also concluded a Treaty of Cooperation for Mutual Legal Assistance, United States of America-United Mexican States, 27 I.L.M. 443 (1988) (entered into force May 8, 1991); and an Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, United States of America-United Mexican States, 29 I.L.M. 58 (1990) (entered into force July 30, 1990).

25, 1980. See Treaty of Extradition, May 4, 1978, United States of America-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656 (hereinafter "Extradition Treaty"), reprinted in Joint Appendix ("J.A.") at 72. The treaty's object and purpose, stated explicitly in its Preamble, was "to cooperate more closely in the fight against crime, and, to this end, to mutually render better assistance in matters of extradition." Id. (emphasis added).

To further this object, the Parties added several provisions not covered in any of their previous extradition treaties, carefully designed to accommodate each other's sovereignty concerns. To ensure mutual certainty regarding the availability of extradition, the parties carefully specified a list of extraditable crimes (appendix), expressly excluded offenses of a political and military character (art. 5), and permitted extradition for offenses committed outside the territory of the requesting state where the person is a national of the requesting state (art. 1). To address cases such as this, where one state seeks surrender of a national of the other, the parties adopted a new Article 9, an "extradite-or-prosecute" provision.

Because Mexican law bars the extradition of Mexican nationals except in extraordinary circumstances, the parties acknowledged that the requested state would not "be bound to deliver up its own nationals." Id. art. 9(1).[3] Instead, the requested state would "have the power to deliver them up if, in its discretion, it be deemed proper to do so." Id. (emphasis added). "If extradition is not granted" pursuant to this provision, the parties specified, "the requested Party shall submit the case to its competent authorities for the purpose of prosecution . . . ." Id. art. 2. (emphasis added).

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[3]See Ley de Extradicion Internacional, Capitulo I, Articulo 14, published in Diario Oficial (Dec. 29, 1975) (no Mexican national may be extradited to a foreign country except in exceptional cases in the discretion of the Executive); Communication from Secretaria de Relaciones Exteriores Consulada General to the Honorable Justices of the Ninth Circuit Court of Appeals, J.A. at 68-69:

> Mexican legislation in force and effect makes it illegal for Mexican Government authorities to exclude a Mexican national from Mexican territory, or for Mexican Government authorities to deport a Mexican national from Mexican territory. Therefore Mexican Government authorities have not entered, and could not enter, into any special arrangement or agreement, either with the United States or with any other country, to surrender its own national.
>
> In the case of extradition treaties to which Mexico is a party, the Government of Mexico has invariably and expressly reserved to the parties the right to refuse requested extradition to one of their own respective nationals, agreeing instead to prosecute them in their own national courts in the interest of justice.

(Emphasis added).

Petitioner would have this Court believe that the United States and Mexico painstakingly negotiated this comprehensive structure of mutual cooperation in criminal matters as an "optional protocol": a wholly optional mechanism, open to circumvention by either party at any time, even over the other party's express objection. Petitioner further claims that forcible government-sponsored kidnapping of an individual from the sovereign territory of the other, over that party's explicit protests, fully accords with the treaty's object and purpose. The treaty's plain language, structure, and negotiating and ratification histories all confirm the District Court's opinion, affirmed by the Ninth Circuit, that petitioner's reinterpretation "is absurd." 745 F. Supp. 599, 610 (C.D. Cal. 1990).

A. The Plain Language of the U.S.-Mexico Treaty Establishes Mandatory Prosecute-or-Extradite Procedures That Are Exclusive in All Cases Not Involving Consensual Rendition.

The treaty's plain language demonstrates the parties' intent to provide mandatory procedures governing the extradition of persons in all cases not involving consensual rendition.[4] Articles 1 and 2 create a duty to extradite for both territorial and extraterritorial offenses and direct that "[e]xtradition shall take place, subject to this Treaty, for willful acts which fall within any of [the extraditable offenses listed in] the clauses of the Appendix..." Id. art. 2 (emphasis added). Virtually all remaining articles employ the mandatory term "shall" to differentiate those circumstances

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[4]"Consensual rendition" refers to the informal, voluntary surrender of a person by one state to another without extradition procedures. Rendition may involve cooperation between law enforcement agencies or use of immigration laws directly or indirectly to accomplish a surrender. See M. Cherif Bassiouni, International Extradition and the World Public Order 121-124 (1974).

where extradition is required from those where each signatory retains discretion to refuse to extradite an alleged criminal.[5]

Petitioner claims that it can simply ignore these mandatory provisions by unilaterally abducting the individual sought, rather than pursuing the carefully specified extradition procedure. Yet such a reading would twist the clear import of the treaty by reconstruing the mandatory words "shall" in these treaty provisions

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[5]"Extradition shall not be granted when the offense for which it is requested is political or of a political character" (art. 5), when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party (art. 6), or "when the prosecution or the enforcement of the penalty for the offense...has become barred by lapse of time according to the laws of the requesting or requested state (art. 7)." The remaining articles similarly use mandatory language with regard to: requests (art. 10), additional evidence (art. 12), procedure (art. 13), decision and surrender (art. 14), third-party requests (art. 16), the rule of specialty (art. 17), surrender of property (art. 19), transit (art. 20), expenses (art. 21), scope (art. 22), and ratification and denunciation (art. 23).

Only a few provisions are worded in nonmandatory terms. Articles 8 and 9 of the treaty refer to circumstances where the obligation to extradite is subject to the discretion of the requested party. Article 8 provides, "When the offense...is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused...." Article 9 provides that the requested party may deliver up its own nationals "if, in its discretion, it be deemed proper to do so," but "[i]f extradition is not granted, the requested party shall submit the case to its competent authorities for purposes of prosecution ....." (emphasis added). Similarly, the provisions regarding the extraordinary provisional arrest (art. 11), delayed surrender (art. 15), and summary extradition (art. 18) are explicitly discretionary.

to mean "may." More fundamentally, petitioner's claim that these provisions are not exclusive, but permit forcible governmental kidnapping, would render many of these treaty provisions meaningless. For example, the provisions requiring "sufficient" evidence to grant extradition (art. 3), withholding extradition for political or military offenses (art. 5), withholding extradition when the person sought has already been tried (art. 6), witholding extradition when the statute of limitations for the crime has lapsed (art. 7), and granting the requested state discretion to refuse to extradite an individual who would face the death penalty in the requesting country (art. 8) would all serve no purpose if the requesting state could simply ignore those restraints and kidnap the sought-after individual.[6]

The extradition treaty is the exclusive means of surrendering a suspect in cases where there is possibility for disagreement between the contracting states. That the signatories may mutually

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[6] As the Ninth Circuit recognized in Verdugo, "[e]ach of these provisions would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct." 939 F.2d at 1349.

agree to consensual informal rendition outside the provisions of the treaty in no way authorizes forcible, state-sponsored abductions without mutual consent. In this case, the Mexican government publicly objected four times to the unilateral abduction by U.S. agents of a Mexican national from Mexico. See Brief of Respondent ("Resp. Br.") at 3-4. Those protests made any rendition nonconsensual and remitted the parties to their two treaty-based remedies: either Mexican prosecution (art. 9(2)) or formal extradition in accordance with the treaty's mandatory terms.

B. To Avoid the Treaty's Mandatory Language, the Justice Department Has Written a New Implied Term into Article 9, Authorizing Forcible, Unconsented Governmental Kidnapping.

The District Court found that lower-level Drug Enforcement Administration (DEA) agents pursued a third, illegal option: they forcibly kidnapped respondent Dr. Alvarez from Mexican territory without Mexican governmental consent, in bald violation of the treaty. See Appendix to Petition ("Pet. App.") at 4a, 24a-25a. After Mexico repeatedly demanded respondent's

return, Justice Department lawyers sought to justify the DEA's action after the fact by claiming that the extradition treaty permits unilateral abductions. By so arguing, the Department seeks, in effect, to amend Article 9 of the treaty, which governs permissible modes of surrendering nationals of the requested country.

When one country seeks surrender of a national of the other, Article 9 requires the requested party either to extradite the individual, or if extradition is not granted, "the requested Party shall submit the case to its competent authorities for the purpose of prosecution" (emphasis added). Had the Justice Department complied with the treaty and filed an extradition request under Article 9, Mexico would have been obliged either to extradite Dr. Alvarez to the United States or to submit his case to competent domestic authorities for prosecution.[7] Mexican prosecutors and courts are fully competent to prosecute and try Dr. Alvarez for the

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[7]The latter course would have been more likely. Because, as petitioner concedes, Mexican law prohibits the extradition of nationals except in exceptional circumstances, "[t]o date, the government of Mexico has not extradited a single Mexican national under the terms of the extradition treaty pursuant to an extradition request by the United States." JD Br. at 21, n.17.

territorial offenses with which he was charged. See Brief for the United Mexican States as Amicus Curiae in support of Granting Review ("Mexican Amicus Brief") at 6. By abducting Dr. Alvarez from Mexico without its consent, lower executive officials in this country denied Mexico its opportunity to exercise either of its treaty options.

Petitioner charges that the District Court found "an implied extradition-treaty obligation [thereby ignoring] the cardinal rule that the courts are not free to rewrite the international agreements to which this Nation is a party." JD Br. at 24-5. Yet ironically, it is petitioner, and not the courts below, that seeks to rewrite the treaty. Under petitioner's reinterpretation, Article 9 would contain a new term, providing:

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the

purpose of prosecution, provided that Party has jurisdiction over the offense.

3. Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other Contracting Party, abduct nationals from the territory of one Party for prosecution in the territory of the other.

Having twice failed below to win judicial endorsement of this novel rewriting, petitioner now asks this Court to revamp Article 9 into "a license or charter for signatory nations to engage in unlawful conduct in all those categories of cases in which the treaty prohibits extradition." Verdugo, 939 F.2d at 1351. Yet as petitioner himself strenuously argues, such judicial amendments are constitutionally forbidden.[8]

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[8]See JD Br. at 24 (citing The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821) ("to alter, amend, or to add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions") and Maximov v. United States, 373 U.S. 49, 54 (1963) ("it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty...when ...there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of the signatories.")); see also JD Br. at 24 (citing Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134-35 (1989); United States v. Stuart, 489 U.S. 353, 371-73 (1989) (Scalia, J., concurring in the judgment)); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 283 (1984) (Stevens, J., dissenting) ("The task of revising an international treaty is not

C. The Negotiating and Ratification Histories of the Treaty Confirm that Petitioner's New Implied Term Violates the Treaty.

The negotiating and ratifying histories of Article 9 and the extradition treaty as a whole fully support the plain language of that article as written.[9] That history demonstrates that neither negotiating party, nor the Senate that ratified the treaty, supported the reinterpretation that petitioner now urges on this Court.

The primary purpose of the parties in negotiating the new Treaty was to promote cooperation.[10] As drafted, Article 9

Court has any authority to perform.").

[9]See United States v. Stuart, 489 U.S. 353, 366 (1989) ("Nontextual sources . . . often assist us in 'giving effect to the intent of the Treaty parties,' such as a treaty's ratification history and its subsequent operation") (citation omitted); id. at 406 n.7 (consideration and consultation of such materials as Senate preratification debates and reports "is eminently reasonable."). This Court has regularly made reference to such materials. See, e.g., Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (1988); Societe Nationale Industrielle Aerospatiale v. U. S. Dist. Ct, 482 U.S. 522 (1987); Air France v. Saks, 470 U.S. 392 (1985); Immigration and Naturalization Service v. Stevic, 467 U.S. 407 (1984); Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243 (1984); Warren v. United States, 340 U.S. 523 (1951).

[10]The new provisions of the Treaty would "make a significant contribution to international cooperation in law enforcement." Presidential Letter of Transmittal attached to Senate Advice and Consent at 3. See also Preamble to Extradition Treaty (the purpose of the treaty is "to cooperate more closely in the fight against crime, and, to this end, to mutually render better assistance in matters of extradition").

served that purpose by binding each party to a prosecute-or-extradite obligation with regard to its own nationals. Precisely because the parties understood the Mexican government's reluctance to extradite its own nationals, Article 9 was drafted to provide the requested state with the alternative of prosecution. Nothing in the negotiating history suggests that the parties intended simultaneously to allow the expedient third option that petitioner now invokes: forcible, unconsented kidnapping of the treaty partner's nationals over the party's express objection.[11]

Nor does any evidence in the treaty's ratification history suggest that the Senate intended to authorize forcible unconsented abduction of nationals of either country.[12] To the contrary, such

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[11]This interpretation "is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject." U.S. v. Rauscher, 119 U.S. 407, 420 (1886). To construe the treaty to permit forcible, non-consensual abductions would be inconsistent with its express purpose of facilitating and increasing cooperation in the area of law enforcement. See Preamble to the Extradition Treaty, quoted in supra note 10.

[12]Petitioner calls it "inconceivable that the President would have negotiated a treaty that overturns Ker [v. Illinois, 119 U.S. 436 (1886)] and then submitted that treaty to Congress without any mention of the issue." JD Br. at 31. Because other briefs filed with this Court fully rebut petitioner's

an understanding would have rendered debates about the treaty's restrictions entirely superfluous. The presidential message accompanying the treaty expressly recognized that:

> The new U.S.-Mexico treaty would permit the U.S. to extradite its own citizens, as does the old treaty. Mexican law, however, prohibits the extradition of Mexican nationals. The treaty thus obliges the requested state, if it does not extradite its own nationals, to submit the case to its competent authorities for a decision as to prosecution, provided that state has jurisdiction over the offense.

Presidential Message, Extradition Treaty Between the United States and Mexico--Changes in the New Treaty at 19 (emphasis added). The State Department Letter of Submittal attached to the Senate's Advice and Consent similarly reflected that the treaty "takes into account the law of Mexico prohibiting the extradition of its

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Ker-Frisbie claims, we need not address them in great detail. See, e.g., Resp. Br. at 33-45. Suffice it to say that the President did not mention Ker to Congress--a case involving private kidnapping without Peruvian government protest at a time when that government was occupied and incapable of receiving an extradition request--because no one imagined that Ker authorized governmental kidnappings in violation of a valid and ongoing extradition treaty over the repeated protests of the treaty partner. Had the Mexican government known that the executive planned to conduct forcible governmental abductions notwithstanding the treaty, presumably it would have protested, as it has consistently done since 1906. See, e.g., JD Br. at 28, n.23 (recounting the Mexican protest regarding the 1906 kidnapping of Antonio Martinez).

nationals but allowing for their prosecution in Mexico for offenses committed abroad." See State Department Letter of Submittal Attached to Senate Advice and Consent at 6.

Significantly, nothing in the ratification history suggests that the executive and Senate entered the treaty intending to allow Mexican officials to forcibly abduct United States citizens from our territory without our consent to be brought to trial in Mexico. It is inconceivable that the Senate would have endorsed this possibility without discussion, had it understood Article 9 implicitly to offer each government a kidnapping option.

In construing a treaty, a Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." Air France v. Saks, 470 U.S. 392, 399 (1985). The plain reading of the Treaty's text and structure, coupled with its negotiating and ratification histories, confirms that Article 9's prosecute-or-extradite mandate was intended to strengthen, not disrupt, cooperation between the United States and Mexico in law enforcement.

II. THIS COURT SHOULD NOT AUTHORIZE DE FACTO AMENDMENT OF A TREATY BY LOWER EXECUTIVE OFFICIALS WITHOUT CONGRESSIONAL CONSULTATION OR CONSENT, AND OVER THE REPEATED, UNEQUIVOCAL OBJECTIONS OF OUR TREATY PARTNER.

The United States-Mexico extradition treaty was consented to by the Senate and agreed to by Mexico. Having made that treaty, the executive branch "is not [now] free to treat a treaty as though it meant something entirely different from what it says. . . . The Constitution . . . give[s the] President power to 'make Treaties' only 'by and with the advice and consent of the Senate.'" Laurence H. Tribe, American Constitutional Law, §4-5, at 225 (2d ed. 1988) (citations omitted). The only extradition treaty that the President was authorized to "make" was the treaty as it was then understood by the Senate and our treaty partner.[13]

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[13]As Professor Louis Henkin has noted:

> The principle that the President can only make a treaty as it is understood by the Senate would govern even if the Senate had given no indication of its understanding of the treaty. In that event, it must be assumed . . . that the Senate understood the treaty to mean what it would be understood to mean by reasonable people, reading the text of the treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose. . . . . That interpretation,

By seizing Dr. Alvarez and others,[14] DEA officials ignored mandatory language in the U.S.-Mexico Extradition Treaty, and introduced new language into Article 9. Justice Department lawyers now invite this Court to endorse this novel reinterpretation. The courts below correctly rejected that invitation, relying upon the treaty's clear language and purposes, the intent and expectations of the Mexican Government,[15] and the understanding of the executive and the Senate upon ratifying the treaty.

To allow lower executive officials to perform such a post hoc unilateral reinterpretation of this treaty would strike at the

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> therefore, is the interpretation which the President must adopt for the United States.

The ABM Treaty and the Constitution: Joint Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 82 (1987) (hereinafter ABM Hearings).

[14]The kidnapping of Dr. Alvarez was not an isolated incident. See also United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), petition for cert. pending, No. 91-670 (involving seizure of Mexican national on Mexican soil by Mexican police officers, at the behest of DEA agents).

[15]The Mexican Government's intent is amply demonstrated by its continuing protests against respondent's forcible abduction. See Mexican Amicus Brief at 10.

heart of our separation of powers.[16] For such reinterpretations amount to de facto amendment of the treaty without the consultation and consent of the Senate or our treaty partner, in contravention of the treaty-making procedures detailed in Article II of the Constitution.[17] "If, following ratification, the Executive could unilaterally change the meaning of a treaty as it had been presented to the Senate, the careful consideration the Senate gives to treaty language, purposes, and effect, would stand in constant peril of nullification by reinterpretation by Executive officials, high or low." Rainbow Navigation v. Department of the Navy, 699 F. Supp. 339, 343 (D.D.C. 1988) (H. Greene, J.), rev'd on other grounds, 911 F.2d 797 (D.C. Cir. 1990).

The final authority to interpret a treaty rests not with the executive, but with the judiciary. See Japan Whaling Ass'n v.

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[16]Unilateral executive reinterpretation of a treaty constitutes "an offensive against the separation of powers and an assault on the Senate's constitutionally specified role in the treatymaking process." ABM Hearings, supra note 13, at 83 (testimony of Laurence H. Tribe).

[17]Article II provides that the President "shall have the Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." U.S. Const., art. II, § 2, cl. 2.

American Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treaties and executive agreements"); Sumitomo Shoji America v. Avagliano, 457 U.S. 176 (1982). This Court can and must bar lower executive officials from reinterpreting the treaty to make it wholly different from the treaty which the parties negotiated and to which the Senate advised and consented.

A. This Court Should Not Sanction a Treaty Amendment Effected by Lower Executive Officials Without Congressional Consultation or Consent.

This case represents a sharp break in the executive's interpretation of the U.S.-Mexico extradition treaties. Until this case, the executive consistently interpreted extradition treaties to preclude kidnapping and forced abduction. As early as 1881, Secretary of State Blaine stated that the U.S.-Mexico extradition treaty "does not authorize either party, for any case, to deviate from [its] forms or arbitrarily [to] abduct from the territory of one party a person charged with a crime, for trial within the jurisdiction of the other." See Letter from Secretary of State James Blaine to O.R.

Roberts, Governor of Texas (May 3, 1881), in Domestic Letters of the Department of State, 1784-1906. In 1887, Secretary of State Bayard confirmed that abductions constitute a clear violation of the U.S.-Mexico extradition treaty. See Letter from Secretary of State T.F. Bayard to Thomas C. Manning (February 26, 1987), in Diplomatic Instructions of the Department of State, 1801-1906. Almost a century later, the executive branch reaffirmed its opposition to transborder abductions in Secretary of State George Schultz's exchange of notes with Canada agreeing to act to deter such abductions. See United States v. Verdugo-Urquidez, 939 F.2d 1341, 1353-54 (9th Cir. 1991). In 1986, then-State Department Legal Adviser Abraham Sofaer testified that "seizure by U.S. officials of terrorist suspects abroad [might be] incompatible with the bilateral extradition treaties that we have in force with [other] nations." Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearings on S. 1429 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st

Sess. 63 (1985). As recently as 1989, Mr. Sofaer told Congress that "[f]orcible abductions from a foreign state clearly violate this principle" requiring respect for foreign sovereignty. Oversight Hearing on FBI Authority to Seize Suspects Abroad Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 100th Cong., 1st Sess. 6 (1989) (statement of Abraham Sofaer, State Department Legal Adviser).

The Government of Mexico has long held the same understanding of the extradition treaty. Indeed, as noted above, Mexico could not agree to the reinterpretation the executive now suggests, because Mexican law forbids its governmental authorities from entering explicit or implicit agreements to surrender their own nationals to foreign governments.[18]

"When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [this Court] must, absent extraordinarily strong

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[18]See supra note 3; JD Br. at 28, n.26 (recounting Mexican protest of U.S. abduction of Antonio Martinez in 1906).

contrary evidence, defer to that interpretation." Sumitomo Shoji America v. Avagliano, 457 U.S. 176, 185 (1982). Yet the Justice Department would now reverse the prevailing interpretation of extradition treaties to include an implied term allowing forcible abductions from a treaty partner's territory.

This Court owes no deference to the Department's newly minted reinterpretation.[19] That reinterpretation runs flatly contrary to the interpretation of the treaty presented to the Senate during the ratification process.[20] The chronology of this case

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[19]Cf. Perkins v. Elg, 307 U.S. 325 (1939) (construing bilateral naturalization treaty in accordance with the historical construction and refusing to defer to change in executive branch policy); Johnson v. Browne, 205 U.S. 309 (1907) (rejecting executive's interpretation of U.S.-U.K. extradition treaty to mean that person can be surrendered for one offense and punished for another); Rainbow Navigation v. Department of the Navy, 699 F. Supp. 339 (D.D.C. 1988), rev'd on other grounds, 911 F.2d 797 (D.C. Cir. 1990) (rejecting executive's reinterpretation of U.S.-Iceland Defense Treaty).

[20]In a similar case, Rainbow Navigation v. Department of the Navy, 699 F. Supp. 339 (D.D.C. 1988), rev'd on other grounds, 911 F.2d 797 (D.C. Cir. 1990), the district court rejected the Department of the Navy's reinterpretation of the U.S.-Iceland Defense Treaty in favor of the original interpretation of the treaty. After examining executive representations to the Senate during the advice-and-consent period, Judge Harold Greene had

> no doubt about the obligation of the Executive Branch to stand behind the representations made by its officials to the Senate committee . . . and to comply with the conditions attached, formally or informally, by the Senate as part of its

strongly suggests that DEA agents effected the seizure of Dr. Alvarez in simple disregard of the bilateral extradition treaty, and that the executive's lawyers manufactured their treaty reinterpretation to provide a post hoc justification.[21] After supporting the Justice Department below, the State Department has failed to join the Solicitor General's brief, rendering the

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> ratification. Any other rule would undermine the authority of the Senate under Article 2 section 2 of the Constitution to concur or fail to concur in treaties . . . .

Id. at 343. Judge Greene determined that the Senate had relied upon executive representations that the existing U.S. military cargo service (Rainbow) would not be disadvantaged as a result of the treaty, thus rendering subsequent disadvantageous changes introduced by the Navy into the competition procedures an unlawful reinterpretation of the treaty. On appeal, the D.C. Circuit concluded that the treaty applied to U.S.-flag service generally, not Rainbow in particular, and that the 1988 Navy rules did not, in fact, depart from the Navy's previous interpretation, but did not question the district court's analysis of the invalidity of unilateral executive reinterpretations.

[21] See Pet. App. at 6a-13a, 24a-25a. As the Ninth Circuit noted in Verdugo, 939 F.2d at 1353, the Legal Adviser's "views [in this case, discussed infra, note 22] appear to have been adopted only with an eye toward the current litgation." This Court has given little credence to a party's position where it constitutes "no more than statements of a litigating position." Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 693 (1976) (quoting counsel's brief). Cf. Securities Industry Association v. Board of Governors of the Federal Reserve System, 468 U.S. 137, 143 (1984) ("agency interpretations of a statute are to be given deference only if the interpretation is one stated by the agency and not merely by the litigating attorney in the context of a lawsuit").

executive branch's views "on the subject before us . . . unclear or ambivalent." Verdugo, 939 F.2d at 1354.[22]

Yet even assuming that the Justice Department's treaty reinterpretation now constitutes the official executive reading, the Constitution bars the executive branch from reinterpreting the treaty without the advice and consent of the Senate. As the Senate Foreign Relations Committee recently noted, "when the President acts beyond the scope of his constitutional authority to interpret a treaty, he is in effect either amending that treaty or making a new one . . . [E]ach such act requires the advice and consent of the Senate." S. Rep. No. 164, 100th Cong., 1st Sess. 42 (1987). Not

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[22]The Ninth Circuit correctly declined to defer to a letter from the State Department Legal Adviser, produced on appeal for the purpose of related litigation, on the ground that the court had no doubts regarding the treaty's unambiguous meaning and that the predecessor Secretary of State and Legal Adviser had both adhered to the prevailing treaty interpretation. Verdugo, 939 F.2d at 1353-54. In any event, this Court has never blindly deferred to State Department legal interpretations. See, e.g., W.S. Kirkpatrick, Inc. v. Environmental Tectonics Corp., 493 U.S. 400, 408-09 (1990) (refusing to adopt position urged by State Department Legal Adviser in the district court, which was found persuasive by the court of appeals); Chan v. Korean Airlines, 490 U.S. 122 (1989) (rejecting Department's interpretation of Warsaw Convention); Wardair Canada v. Florida Dep't of Revenue, 477 U.S. 1 (1986) (rejecting executive's interpretation of aviation treaty); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (six Justices reject claim of absolute judicial deference to executive branch in act of state cases).

only did lower executive officials fail to follow their constitutional duty to present this new treaty to the Senate; the Senate would not have accepted the implied term because it violates the central purposes of the extradition treaty. See Part III, infra.

B. This Court Should Not Sanction a Treaty Amendment Effected by Lower Executive Officials Over the Repeated, Unequivocal Objections of Our Treaty Partner.

The de facto amendment attempted here becomes particularly egregious in view of our treaty partner's repeated and vociferous rejection of it. One contracting party to a treaty cannot change the terms of the treaty by itself, over its partner's objections.[23] Furthermore, this Court recognized that

> [t]here is something . . . which shocks the conscience in the idea that a treaty can be put forth as

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[23]See American Law Institute, 1 Restatement (Third) of Foreign Relations Law of the United States § 334(1), at 213 (1987) (hereinafter Restatement (Third) ("An international agreement may be amended by agreement between the parties.") (emphasis added); Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969, Art. 39, 40, U.N. Doc. A/Conf.39/27 (1969), reprinted in 8 I.L.M. 679 (1969) (hereinafter "Vienna Convention").

> embodying the terms of an arrangement with a foreign power . . . a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it.

New York Indians v. United States, 170 U.S. 1, 23 (1898). Former Legal Adviser Abraham Sofaer has recently argued that, when interpreting treaties, "a President should act only in good faith and should . . . avoid changing established and accepted norms." Abraham D. Sofaer, Treaty Interpretation: A Comment, 137 U. Pa. L. Rev. 1437, 1448 (1989).[24] As petitioner notes, the United

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[24]The Rapporteur of the Special Working Committee on Legal Aspects of Current Issues of Arms Control and Disarmament Policy of the American Society of International Law has recently delineated an eight-factor test to determine the appropriate interpretation of a treaty: what the Senate said when providing advice and consent; what was said to the Senate by the executive branch prior to ratification to create an understanding of the treaty; the attitude of the other party to competing treaty interpretations; how much support there is in the treaty text and record for the two interpretations; the record of subsequent practice of the treaty parties; how different the new interpretation is from the old; whether the new interpretation purports to create new obligations; and whether there are any changed circumstances that affect the treaty. See David A. Koplow, Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties, 137 U. Pa. L. Rev. 1353, 1418-25 (1989). In this case, these factors overwhelmingly favor the prevailing interpretation of the extradition treaty: neither the Senate nor Mexico contemplated that forcible abduction would be a permissible means for obtaining jurisdiction over a national of the other state; the executive's representations are consistent with the prevailing interpretation; Mexico has

States is currently a "party to more than 100 extradition treaties, some of which are more than a century old," and some of which draw verbatim from the text of the U.S.-Mexico accord. JD Br. at 27. If petitioner's reading is correct, all of these extradition treaties could be reconstrued to permit forcible extraterritorial abductions over the objections of the treaty partner.[25] Under petitioner's reading, our treaty partners could invoke such a reinterpretation to forcibly abduct U.S. nationals on U.S. soil, over our government's repeated and vociferous objections. This Court should not sanction such a chaotic and lawless result.

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strongly objected to the reinterpretation; the text and record provide no support for the permissibility of forcible abduction; a practice of unconsented forcible abductions would dramatically disrupt the prevailing practice of consensual extraditions and renditions; the new interpretation amends existing obligations; and no evidence exists that circumstances have substantially changed since the treaty was entered.

[25]Eleven of our current extradition treaties have provisions similar to Article 9. See Resp. Br. at 12, n.6 (listing treaties). At a minimum, petitioner's argument would also purport to read an implied kidnapping term into those treaties as well. Significantly, both Canada and Mexico, our contiguous neighbors most likely to be adversely affected by petitioner's reinterpretation, have filed amicus briefs urging affirmance of the Ninth Circuit's ruling.

III. THIS COURT SHOULD NOT SANCTION AN EXECUTIVE REINTERPRETATION OF A TREATY THAT NULLIFIES THE TREATY BY VIOLATING THE NORMS OF INTERNATIONAL LAW THAT GAVE IT RISE.

Even if lower executive officials could unilaterally reinterpret a treaty, they should not be able to reinterpret that treaty so as to fundamentally violate the norms of customary international law that shape its object and purpose. The parties negotiated this treaty to avoid fractious disputes, to protect territorial sovereignty from forcible intrusions, and to protect individual suspects from arbitrary arrests and detentions. By reinterpreting the treaty, petitioner has provoked precisely the kind of contentious dispute, territorial invasion, and arbitrary arrest that the treaty was designed to prevent. If executive officers can turn the treaty on its head, and reinterpret it to mean the very opposite of the parties' original intent, they will have arrogated to

themselves the power not just of unilateral treaty amendment, but of unilateral treaty nullification.[26]

A. This Court Must Construe the Extradition Treaty in Accordance With Its Object and Purpose and Well-Settled Rules of International Law.

Petitioner claims that the absence in the extradition treaty of any language expressly forbidding the signatories from making arrests in each other's territory effectively authorizes forcible state-sponsored abductions. Yet treaty construction cannot transpire in a vacuum, in which established international-law rules and centuries of historical practice are simply ignored.

This Court has long recognized that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains...." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). See also U.S. v.

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[26]In Goldwater v. Carter, this Court declined to review, on justiciability grounds, presidential termination of a bilateral treaty in accordance with its terms. See 444 U.S. 996 (1979) (one Justice concluding that the case was not ripe and four Justices concluding that it presented a political question). But this Court has never sanctioned nullification of a treaty by lower executive actors in a manner nowhere contemplated by the treaty itself.

PLO, 695 F. Supp. 1456, 1464-65 (S.D.N.Y. 1988). That interpretive principle applies with even greater force with regard to the construction of treaties, which generally arise through the formalization or codification of preexisting norms of customary international law.

The Vienna Convention on the Law of Treaties provides a general rule of treaty interpretation:

> There shall be taken into account together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.

Vienna Convention, supra note 23, art. 31(3) (emphasis added).[27] This rule, known as the principle of consistency, makes clear "that the contracting parties [to a treaty] intend something reasonable and something not inconsistent with generally recognized principles of International Law." Lassa Oppenheim, International Law 952 (H. Lauterpacht ed., 8th ed.) (footnotes omitted). "In accordance with the principle of consistency, treaties should be interpreted in

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[27]The State Department has stated that "the convention is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971).

the light of existing international law." Joseph G. Starke, An Introduction to International Law 480 (10th ed. 1989). United States courts have regularly applied this principle in extradition cases. See, e.g., United States v. Rauscher, 119 U.S. 407, 429 (1886) (construing Webster-Ashburton Treaty consistently with customary international law).

The Vienna Convention further specifies that

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Vienna Convention, Art. 31(1) (emphasis added). That principle has been adopted virtually verbatim in Section 325 of the Restatement (Third), supra note 23, and is regularly applied by federal courts. See, e.g., Day v. Trans World Airlines, 528 F.2d 31, 33 (2d Cir. 1975) (applying Vienna Convention rule in interpreting multilateral treaty).

Thus, the question whether the extradition treaty between the United States and Mexico permits unconsented, forcible state-sponsored abductions must be considered in light of both the

international law norms that gave rise to the treaty and the treaty's broader object and purpose.

B. Forcible, Unconsented, State-Sponsored Abductions Defeat the Object and Purpose of an Extradition Treaty and Violate Settled Rules of Both Customary and Conventional International Law

This Court has long recognized the sanctity of state sovereignty as perhaps the most fundamental principle of international law. "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . All exceptions [to such absolute jurisdiction] must be traced up to the consent of the nation itself." Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); see also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court, 482 U.S. 522, 557 n.12 (1987). Thus, "the first and foremost restriction imposed by international law upon a State is that--failing the existence of a permissive rule to the contrary--it may not exercise its power in any form in the territory of another State." See The S.S. Lotus, P.C.I.J., (ser. A) No. 10, at 18 (1927) (emphasis added). This central norm of

customary international law has been codified in numerous treaties to which both Mexico and the United States are parties.[28]

Forcible, state-sponsored abduction of a national from his own country violates the international norm of territorial sovereignty, and breaches core norms of customary international law[29] and binding treaties.[30] Such abductions not only offend

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[28]The U.N. Charter provides that

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .

U.N. Charter art. 2, para. 4. Similarly, article 17 of the Charter of the Organization of American States provides in even more stringent terms:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever....

Charter of the Organization of American States, done at Bogota April 30, 1948, entered into force Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. Protocol of Amendment, done at Buenos Aires, Feb. 27, 1967, entered into force, Feb. 27, 1970, 21 U.S.T. 607, T.I.A.S. No. 6847.

[29]"A State must not perform acts of sovereignty in the territory of another State." 1 Lassa Oppenheim, International Law 295 (H. Lauterpacht ed., 8th ed.) (1955). "It is therefore a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime." Id. n.1. "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Restatement (Third), supra note 23, § 432(2) at 329.

state sovereignty, but also international human rights norms expressed in international declarations and conventants.[31] These

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[30]United States courts have held that forcible abductions of fugitives by U.S. agents violate both the U.N. and O.A.S. Charters, unless the other state consents or acquiesces. United States ex. rel. Lujan v. Gengler, 510 F.2d 62, 66-68 (2d Cir. 1975); United States v. Toscanino, 500 F.2d 267, 277 (2d Cir. 1974). Responding to Israel's kidnapping of former Nazi Adolph Eichmann from Argentina, the Security Council construed Article 2(4) of the United Nations Charter to prohibit forcible abduction without consent or acquiescence by the asylum state. See U.N. Security Council Resolution 138, 15 U.N. SCOR, U.N. Doc. S/4349, Resolutions and Decisions at 4 (June 23, 1960).

[31]The Universal Declaration of Human Rights, for example, provides that "[n]o one shall be subjected to arbitrary arrest, detention, or exile." Art. 9, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948). Article 9(1) of the International Covenant on Civil and Political Rights similarly declares that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967). The Human Rights Committee established under the Optional Protocol to the Covenant has held that abduction of a Uruguayan refugee from Argentina by Uruguayan agents constituted a violation of article 9 and that Uruguay was therefore required to provide an effective remedy, including immediate release of the refugee with permission to return to Argentina. See Views of the Human Rights Committee on the Complaint of Lopez, July 29, 1981, 36 U.N. GAOR Supp. (No. 40) at 176-184, U.N. Doc. A/36/40 (1981). The Inter-American Convention on Human Rights also forbids arbitrary arrest, art. 7(3), and provides that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State party concerned or by a law established pursuant thereto." The Inter-American Convention on Human Rights, Art. 7(2), Nov. 22 1969, O.A.S. Official Records Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970).

norms define respondent's rights and provide the background against which this Court must interpret the extradition treaty.

Extradition treaties reinforce these norms because they exist precisely to protect territorial sovereignty and individual freedom from arbitrary detention. They serve the over-arching purpose of preventing international conflict by providing agreed-upon standards whereby parties may cooperate to avoid retaliatory invasions of territorial sovereignty.[32]

Petitioner ignores the extradition treaty's broad purposes of reducing interstate conflicts, protecting territorial sovereignty, and minimizing arbitrary detentions. Instead, petitioner maintains that extradition treaties serve only the narrow purpose of imposing "obligations on the contracting parties to surrender criminal

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[32]Absent a treaty, the principle of territorial sovereignty gives each nation the unqualified right to provide asylum to anyone within its territory. Jaffe v. Smith, 825 F.2d 304, 306 (11th Cir. 1987). Before the proliferation of extradition treaties during the nineteenth century, European states commonly granted asylum to fugitives from other states, with the result that

> a sovereign could enforce the return of fugitives only by force of arms. . . . Extradition as an inducement to peaceful relations and friendly cooperation between states remained of little practical significance until after World War I.

M. Cherif Bassiouni, supra note 4, at 6.

fugitives."[33] JD Br. at 14. But were this the treaty's sole object and purpose, there would be no explanation for its articles that serve to safeguard fugitives' rights and sovereign prerogatives, even where those interests inhibit the prosecution of crime.[34]

The object and purpose of reducing conflict by promoting cooperation explains why extradition treaties do not prohibit informal consensual rendition of fugitives, but do prohibit state-sponsored abductions. When a state delivers a fugitive to another by informal rendition, it waives whatever treaty rights it may have

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[33]Petitioner must take such a narrow view of the extradition treaty's purpose, because even a slightly broader view--that they are designed to protect territorial sovereignty, facilitate law enforcement, and protect suspects' rights--compels the conclusion that the DEA agents who arranged Dr. Alvarez's abduction themselves committed serious crimes (kidnapping, abduction, and false imprisonment) that are extraditable under the U.S.-Mexico treaty. See Treaty appendix, cl. 4, reprinted in J.A. at 85. See also Requests of the United Mexican States to the United States for the provisional detention of DEA Special Agent Hector Berrellez, J.A. at 53 (seeking DEA agent's extradition under treaty).

[34]See, e.g., United States-Mexico Treaty provisions barring double jeopardy (art. 6), limiting extradition to a specific list of serious crimes (art. 2), permitting either nation to refuse to extradite its own citizens regardless of their crimes (art. 9), and prohibiting extradition for political offenses (art. 5). These articles do not make the treaty more effective as a weapon in the fight against crime; they serve the larger purposes of protecting suspects in one state from arbitrary proceedings in the other and controlling controversies between the signatories over the surrender of fugitives.

to grant asylum or to provide the fugitive with the safeguards of the extradition process. But such a rendition, whether motivated by comity, good will, or mutual convenience,[35] in no sense offends the fundamental purpose of extradition treaties: to forestall international conflicts. Extradition treaties have never been held to exclude informal delivery of fugitives by one state to another, because when one state willingly surrenders a fugitive, there is no international dispute to prevent or control.[36]

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[35]In 1823, Chief Justice Tilgman of Pennsylvania recognized that, absent treaty-based standards, requests for delivery of fugitives pose a danger to peaceful relations. In the absence of a treaty, he noted one nation could ask another to deliver a fugitive "as a matter of courtesy, good will, and mutual convenience. But a refusal to grant such a request is no just cause for war." Commonwealth v. Deacon, 10 Serg. & Rawle 125, 131 (1823). This Court has similarly distinguished interstate abductions, of the kind that it permitted in Frisbie v. Collins, 342 U.S. 519 (1952), from international abductions like the one challenged here, on the ground that states, unlike sovereign nations, "cannot declare war or authorize reprisals on other States." Mahon v. Justice, 127 U.S. 700, 705 (1888).

[36]See, e. g., United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) (informal surrender of fugitive does not violate extradition treaty); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975) (same); Restatement (Third), supra note 23, § 475, reporters' note 6, at 566 (citing cases). Even when states agree, however, "if the disguised extradition involves unconscionable conduct [offending individual rights], considerations of due process and human rights may lead to discharge of the accused." Id.

Forcible, unconsented, state-sponsored abductions, by contrast, violate the fundamental object and purpose of extradition treaties. By circumventing a state's treaty rights and invading territorial sovereignty, they provoke precisely the kind of international dispute that extradition treaties were designed to prevent.[37] Moreover, they undermine the goal of minimizing arbitrary arrests and detentions in order to facilitate criminal prosecutions at all costs.[38]

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[37]Following the abduction of Adolph Eichmann from Argentina, for example, the United Nations Security Council declared that such abductions involve a breach of the principles upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace. See U.N. Security Council Resolution 138, 15 U.N. SCOR, U.N. Doc. S/4349, Resolutions and Decisions at 4 (June 23, 1960).

[38]To justify extending the Ker-Frisbie rule to this case, petitioner reiterates that foreclosing respondent's U.S. prosecution is "too high a price for society to pay" for an unlawful arrest. JD Br. at 8, 17. Yet petitioner weighs in the balance only the price of lost United States prosecutions, simply ignoring the countervailing costs that forcible abductions inflict upon international cooperation, territorial sovereignty, respondent's right to be free from arbitrary arrest, and forgone Mexican prosecutions. Petitioner overlooks that the Ker-Frisbie rule developed in the context of interstate abductions, which necessarily impose fewer costs on society because states of the union cannot "authorize reprisals on other states," Mahon v. Justice, 127 U.S. 700, 705 (1888), but can effectively prosecute agents of sister states who abduct their citizens.

C. No Serious Dispute Exists Regarding Respondent's "Standing" to Raise the Treaty Violation.

If the state whose sovereignty has been violated protests the violation of its treaty rights and demands the abductee's return, as Mexico has repeatedly done here, a court may not ignore its protest and try the abductee without condoning and perpetuating the treaty violation. Even if the extraditing state waives its treaty rights, U.S. courts have held that a kidnapped defendant can assert the violation of an extradition treaty--which offends not just his country's rights, but his personal right to be free from arbitrary arrest and detention--to defeat the court's jurisdiction.[39] When a state unambiguously demands its national's return, it becomes even

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[39] See, e.g., United States v. Rauscher, 119 U.S. 407 (1886) (defendant delivered pursuant to an extradition order or its equivalent has standing to challenge a violation of that order without having to prove that the extraditing state objects); United States v. Therion, 813 F.2d 146, 151 n.5 (8th Cir. 1987) ("[t]he government's argument that Therion lacked standing to complain of a violation of the treaty is without merit"); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) (per curiam) ("the person extradited may raise whatever objections the rendering country may have"), cert. denied, 479 U.S. 1009 (1986); United States v. Vreeken, 603 F. Supp. 715, 717 (D. Utah 1984) ("the defendant can successfully challenge the court's jurisdiction over his person if he is before the court in violation of an international treaty"), aff'd, 803 F.2d 1085 (10th Cir. 1986), cert. denied, 479 U.S. 1067 (1987).

clearer that the national may invoke the extradition treaty and his nation's demand to defeat the court's jurisdiction.[40]

Petitioner's claim that only Mexico, and not Dr. Alvarez, has "standing" to raise the treaty violation is therefore meritless. See generally Resp. Br. at 46-53. This case has nothing to do with "standing," in the traditional sense that a civil plaintiff must show injury in fact, causation, and redressability sufficient to satisfy the "case or controversy" requirement of Article III.[41] United States courts have regularly granted relief to criminal defendants, such as

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[40]See, e.g., United States v. Toscanino, 500 F.2d 267, 275, 277 (2d Cir. 1974) (barring the court's acquisition of power over the person of a suspect "kidnapped and forcibly brought within the jurisdiction," "in violation of international treaties of the United States" when the court's "acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct"); U.S. ex rel Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975) ("hold[ing] only that given Lujan's failure to allege that Argentina or Bolivia protested his abduction . . . there is no justification for ordering the district court to divest itself of jurisdiction over him"); Restatement (Third), supra note 23, § 432, comment c, at 329-30 ("If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned.") (emphasis added); id., reporters' note 2, at 331 (the proposition that "only states, and not individuals, may raise objections to violations of international law" has "been largely abandoned as [a] general princip[e] . . .").

[41]See generally William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221 (1988).

respondent, who are threatened with prosecution in violation of the terms of an extradition treaty.[42] Moreover, this Court has long recognized that even civil plaintiffs may directly invoke treaties of friendship, commerce and navigation, which similarly confer rights upon both states and individuals, and from which American extradition treaties historically derive.[43]

Dr. Alvarez may invoke the extradition treaty in his defense in precisely the same way that any criminal defendant may invoke the doctrine of federal preemption or jurisdictional limits in the federal statute under which he is being prosecuted. As in such cases, he may invoke the treaty not because "it grants him standing,"

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[42]See, e.g. U.S. v. Rauscher, 119 U.S. 407 (1886); Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936).

[43]See, e.g., Asakura v. City of Seattle, 265 U.S. 332 (1924) (enforcing U.S.-Japan Friendship, Commerce, and Navigation treaty at the request of an individual). "Such extradition provisions as did exist [in early treaties] were included only incidentally in treaties of peace and alliance, in which the willingness to deliver up the criminals of the other party was just one of a number of gestures of friendship and cooperation." I. Shearer, Extradition in International Law 6 (1971). Indeed, the earliest American treaty to provide for extradition, the Jay Treaty of 1794, was just such a treaty of amity, commerce, and navigation, containing an agreement to extradite in article 27. See 1 W. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers (1776-1909), at 590 (1910).

but because under Article VI, cl. 2 of the Constitution, the treaty is the "supreme Law of the Land," and acts as a self-executing limitation upon unlawful government action.

D. No United States Court Has Ever Tried an Illegally Kidnapped Foreign National, Brought Here In Violation of a Valid Extradition Treaty, Over the Treaty Partner's Repeated Protests.

Before the Ninth Circuit in Verdugo, petitioner conceded that

> in no reported case has a court held that officially authorized or sponsored kidnapping did not violate an extradition treaty when the country from which the defendant was kidnapped objected to the abduction.

United States v. Verdugo-Urquidez, 939 F.2d 1341, 1346 (9th Cir. 1991). Petitioner now claims that the issue has not arisen before because no defendant has ever successfully claimed forcible abduction from another jurisdiction as a defense in criminal proceedings. Petition in United States v. Verdugo-Urquidez, No. 91-670 at 8. In reality, the issue has never arisen because the

United States has never before made a practice of disregarding extradition treaties and trying suspects whom it has kidnapped.[44]

Petitioner reasons that the U.S.-Mexico extradition treaty silently authorized forcible abductions, because it did not expressly forbid them. But the treaty's silence regarding state-sponsored kidnapping resulted from the parties' contemporaneous understanding that international law prohibited one sovereign from forcibly violating the territory of another. The treaty also does not expressly forbid the United States from entering Mexico and summarily executing criminal suspects. But as with forcible

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[44]Those nations which have seized fugitives in violation of another nation's territory have usually returned the fugitive upon the other state's demand. See Restatement (Third), supra note 23, § 432 and reporters' note 3 ("Under prevailing practice . . . states ordinarily refrain from trying persons illegally brought from another state . . . if that state demands the person's return."). In 1872, for example, the Attorney General ordered the release and dismissal of charges against Rufus Bratton, a U.S. citizen who had been abducted from Canada by a police detective from South Carolina. John Bassett Moore, A Treatise on Extradition and Interstate Rendition § 190 (1891). A century later, U.S. agents crossed the Canadian border in hot pursuit of a U.S. deserter and seized him fifty yards inside Canada, but returned him as soon as Canada protested. 1 M. Cherif Bassiouni, International Extradition: United States Law and Practice 235 (2d rev. ed. 1987). Nor is the Mexican case involving Antonio Martinez, cited in JD Br. at 28 n.23, an exception to this rule. That case involved a private abductor, acting without governmental authority, whose actions violated no treaty obligation of the United States. See id.

abductions, no such express prohibition was required because the practice was already plainly proscribed by background norms against which the treaty was drafted. Indeed, only two months after the treaty entered into force, the Justice Department's Office of Legal Counsel (OLC) explicitly recognized these background norms, issuing an opinion entitled "Extraterritorial Apprehension by the Federal Bureau of Investigation." 4B Op. Off. Leg. Counsel 543 (March 31, 1980). That opinion concluded that "the FBI only has lawful authority [to engage in extraterritorial apprehension] when the asylum state acquiesces to the proposed operation." Id. at 544. The OLC reasoned that

> a forcible abduction, when coupled with a protest by the asylum state is a violation of international law. . . . It is regarded as an impermissible invasion of the territorial integrity of another state. . . . Nor do there appear to be any doctrines of self-help or self-defense applicable in this context.[45]

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[45] Id. at 549. The 1980 OLC opinion also concluded that the FBI could not make apprehension in contravention of international law under its general enabling statutes, reasoning that those statutes must be construed restrictively to prohibit any departure from the standards of international law. Id. at 551-53.

In June 1989, less than a year before Dr. Alvarez was abducted, the Office of Legal Counsel issued a secret opinion partially reversing the 1980 opinion.[46] As the title of his statement regarding that opinion suggests, then-Assistant Attorney General William P. Barr explicitly conceded that such extraterritorial apprehensions "depart from international law," but contended that the President could override customary international law.[47] In so saying he specified that the "1989 opinion does not address the legal implications of deploying the FBI in violation of provisions of self-executing treaties," a category that has

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[46]See Statement of William P. Barr, Assistant Attorney General for the Office of Legal Counsel on the Legality As a Matter of Domestic Law of Extraterritorial Law Enforcement Activities That Depart From International Law, Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States House of Representatives at 8 (Nov. 8, 1989). Mr. Barr testified that "the content of the 1989 Opinion . . . must remain confidential, [but] I am happy to share with the Committee our legal reasoning and conclusions." Id. at 3.

[47]Mr. Barr reasoned that "the FBI's general enabling statutes should be construed as permitting the agency to take extraterritorial action either when such actions are consistent with customary international law (as with the consent of a foreign sovereign), or when the agency has been directed to do so by a 'controlling executive act' that supplants customary international law." Id. at 8 (emphasis added).

traditionally included extradition treaties. Id. at 4. See Resp. Br. at 46-53 (demonstrating that extradition treaties are self-executing).

Until this case, the Justice Department has never claimed a general executive authority not simply to override customary international law, but to nullify a duly ratified treaty without the advice and consent of the Senate, over the repeated protest of our treaty partner, and in flagrant violation of well-established norms of international law.[48] The courts below wisely declined the Department's invitation to engage in sweeping judicial revision of an unambiguous, painstakingly negotiated treaty. This Court should similarly reject the Justice Department's effort to stand the U.S.-Mexico extradition treaty on its head by effecting a unilateral reinterpretation that would rob the treaty of operative force.

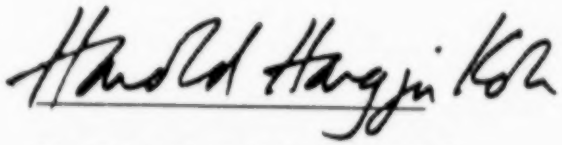
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[48]Nor has the Justice Department identified any "controlling executive act," presidential or otherwise, that was expressly intended to supplant international law in this case. Absent such an act, "[i]nternational law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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